

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

## Advice Memorandum

DATE: February 24, 2005

TO : Celeste Mattina, Regional Director  
Region 2

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Local 78, Asbestos, Lead & Hazardous Waste  
Laborers, LIUNA  
(River Terrace Associates, LLC  
aka "The Solaire")  
Case 2-CC-2626

560-5067-4025  
560-7540-8060-6717  
578-8075-0100

Local 78, Asbestos, Lead & Hazardous Waste  
Laborers, LIUNA  
(Panzner Brothers Demolition, Inc.)  
Cases 2-CC-2627 and 2-CP-1054

These cases were submitted for advice as to whether the Union's display of an inflated rat balloon while handbilling violated Sections 8(b)(4)(B) and 8(b)(7)(C). We conclude that, under the totality of the circumstances, the Region should dismiss the charges, absent withdrawal.

### **FACTS**

Charging Party River Terrace Associates, LLC holds a lease on an apartment building in Manhattan called "The Solaire." River Terrace is owned by the Albanese Organization, Inc., a firm that also has a controlling interest in 1001 Realty LLC, which owns a commercial property located in Garden City, Long Island.

In 2004, 1001 Realty contracted with Charging Party Panzner Brothers Demolition, Inc., a non-union firm, to perform demolition and asbestos abatement work at its Long Island property. On October 7, 2004,<sup>1</sup> two agents from Respondent Local 78 of the Asbestos, Lead & Hazardous Waste Laborers, LIUNA, asked Albanese superintendent Alex Kurkin how Panzner either could be replaced on the project or how it could join the union. Kurkin responded that work had already started and that it was too late to do anything.

On October 19, two Union agents appeared at The Solaire in a white pick up truck with Local 78 logos. One agent walked into the building and placed a handbill on the

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<sup>1</sup> All dates are in 2004 unless specified otherwise.

concierge's desk, saying that he would be handing them out, while the other agent began assembling a twelve-foot tall inflatable rat. A manager at The Solaire informed them that Panzner Demolition, the company named on their handbills, was not doing any work at The Solaire. The agents responded that they were instructed to be there. Shortly thereafter the police arrived and told the Union agents that they needed a permit before erecting the rat. No rat was erected that day. Instead, the Union agents distributed handbills.

The Union used four handbills. One handbill provides that,

The Albanese Organization or one of its family of affiliates has hired a substandard company to do deadly asbestos abatement in a building on Long Island. Panzner Bros. Demolition, a company that refuses to pay prevailing wages and is destroying industry standards ...

The handbill encourages individuals to call an Albanese representative. It asserts that "We are not seeking to induce any person to cease work or refuse to make deliveries. Laborers Local 78."

A second handbill asserts that "The Albanese Organization is waging war against Long Island families. They have hired Panzner Bros. Demolition, a non-union, sub-standard contractor that refuses to pay its workers the prevailing wage ..." It encourages individuals to call an Albanese official, and states that "we" (the Union is not named) are not seeking to induce employees to cease working.

A third handbill names the Albanese Organization as having hired Panzner Bros. Demolition "to do work in their buildings." It refers to Panzner as a "sub-standard company" that "refuses to pay prevailing wages and is destroying industry standards." It does not mention that Panzner is working only at the Long Island facility. Rather, the handbill questions whether Panzner is "acting in a responsible manner in your building." This was the Union's first handbill in this campaign, which it stopped distributing either in part or in whole by November 2004. A fourth handbill merely describes health hazards associated with asbestos exposure, without making any reference to the dispute, the Union or the parties.

On October 20, two Union agents reappeared and began distributing handbills near a revolving door used primarily

by tenants and visitors at the front of the building.<sup>2</sup> For around 30-45 minutes the Union's white van marked "Scab Hunters Local 78" was situated in front of the building in the "No Standing" zone, the area from which tenants usually hail cabs. The Union did not erect an inflatable rat on this day.

From October 21-23 and 26, two Union agents distributed handbills for approximately two hours each day near the building's front entrances. On October 21 only, Union agents erected the inflatable rat on the sidewalk in front of the entrance. There is no evidence that the Union agents or the placement of the inflatable rat interfered in any way with the operation of the building or blocked the ingress or egress of tenants, visitors or suppliers. During the ensuing campaign, handbillers often wore jackets with no logos of any kind, though a few times in October they wore shirts with a small stitched Local 78 insignia. The inflatable rat did not contain any markings or signage that would identify it as being part of a Union demonstration. In general, the Union inflated the rat for between about two to six hours on the days it was used, although Union agents often remained near The Solaire to handbill both before and after they displayed the rat.

On October 27, two agents appeared at the building and began handbilling. They were prevented from inflating the rat by representatives from the New York City Parks Department and the Battery Park City Authority who demanded a permit. On October 29, two Union agents handbilled at The Solaire, again without the use of a rat because of technical difficulties in its assembly.

Two Union agents inflated the rat and handbilled at The Solaire on one day in November; five days in December; 16 days in January and; to date, five days in February. On February 3, a building superintendent heard one of the handbillers read loudly from the handbill to a resident unloading his car. And on February 8, one of the two Union agents handbilled at a rear resident/visitor entrance to the building adjoining Teardrop Park.

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<sup>2</sup> Deliveries to the building come to a side entrance, rather than one of three front entrances used primarily by tenants and their visitors.

**ACTION**

We conclude that the Region should dismiss these charges because the evidence does not indicate that the Union engaged in confrontational activities by erecting an inflatable rat and handbilling the public.

We have previously concluded that a Union's use of a large inflated rat - together with other elements of confrontation - could constitute Section 8(b)(4) violative conduct. Thus, the use of a rat to further a union's confrontational campaign could be viewed as not merely First Amendment protected speech but also conduct tantamount to picketing intended to induce employees to withhold services or persuade third persons not to do business with these establishments.<sup>3</sup>

Thus, under some circumstances, a rat can be considered a well-known symbol of a labor dispute and could constitute a signal to third persons that there is an invisible picket line they should not cross. For instance, in Brandon Regional Hospital<sup>4</sup> union agents with an area standards dispute against a construction employer handbilled the public alongside a tall inflated rat that they deployed about 100 feet from the hospital's main entrance, but several hundred yards from the construction site entrances used by the primary employer. The union hung a banner on the rat naming the primary employer (Workers Temporary Staffing or WTS), but did not explain on the banner the relationship between the primary and the neutral hospital, or that the union's dispute was with WTS only. The union also failed to identify itself as a representative of building trade employees, rather than the employer's hospital workers. Furthermore, the handbills the union distributed depicted a rat in a patient's room, which served to emphasize the false and misleading impression that the hospital was the "rat" employer in the dispute. Under all these circumstances, we concluded that the union engaged in confrontational picketing by intentionally misleading the public to falsely portray the hospital as the primary target of the union's campaign.<sup>5</sup>

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<sup>3</sup> Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Trades Council, 485 U.S. 568, 580 (1988), citing NLRB v. Retail Store Employees Local 1001 (Safeco), 447 U.S. 607, 619 (1980).

<sup>4</sup> Case 12-CC-1258, Advice Memorandum dated April 4, 2003.

<sup>5</sup> Administrative Law Judge George Carson II adopted the Advice theory in Sheet Metal Workers International

By comparison, we have directed the Region to dismiss picketing allegations where the totality of circumstances fall short of those required to prove signal picketing. In Yates Restoration Group, Ltd.,<sup>6</sup> the union did not consistently use a rat during its demonstrations against the primary employer; on some days it engaged solely in handbilling using leaflets that clearly identified the union as a construction industry representative. The possibility that the public might confuse the neutral and the primary employer was reduced where the rat balloon was erected in front of large buildings that housed multiple tenants. And the union's campaign, which was directed at the general public, had been suspended by the time Advice addressed the alleged violation. In Richardson & Lucas,<sup>7</sup> we similarly concluded that the Union did not engage in confrontational picketing despite using a rat balloon during its handbilling campaign. As in Yates, the union deployed the inflatable rat only sporadically; it relied solely on handbilling on some days, while on other days it erected an "Uncle Sam" balloon lacking any historical connection to a labor dispute. Like Yates, the Union identified itself on its handbills as a construction industry representative. The union also did not attempt to induce employees to withhold services, which is a usual purpose of picketing. And, as in Yates, the union suspended the use of the rat by the time Advice was sought. And in neither Yates nor Richardson & Lucas did the union place a banner on the rat itself.

On balance, we conclude that this case presents facts more similar to the Yates and Richardson & Lucas memoranda than to Brandon Regional Hospital. As opposed to Brandon, the Respondent,

- erected a rat that was devoid of any signage that might serve to confuse the primary with the neutral employer.

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Association, Local 15, AFL-CIO (Galencare, Inc. d/b/a Brandon Regional Medical Center), JD (ATL) 61-04, slip op. at 8-10 (December 7, 2004).

<sup>6</sup> Bricklayers Local 1 (Yates Restoration Group, Ltd.), Case 2-CC-2594, et al., Advice Memorandum dated January 12, 2004.

<sup>7</sup> Bricklayers Local 1 (Richardson & Lucas), Case 2-CP-1039, Advice Memorandum dated January 16, 2004.

- clearly identified itself as representing construction industry employees, rather than individuals commonly employed by a co-op or apartment building (e.g., custodians or maintenance employees).<sup>8</sup>
- did not enmesh the neutral by erecting the rat far from a construction entrance occupied by employees of the primary.

Furthermore, as in Yates and Richardson & Lucas, the Union did not consistently accompany handbilling with the rat balloon. On some days, it engaged in pure handbilling, and when it used the rat, it did not do so for the entire day, while handbilling before and afterwards. In sum, the Union's nonconfrontational conduct and its inconsistent use of an otherwise unidentified and ambiguous rat balloon does not establish that the Union intended to create an invisible "picket line" that people would not cross, rather than to draw the public's attention to its lawful handbilling activity.<sup>9</sup>

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<sup>8</sup> We note that one of the Union's four handbills states that the Albanese Organization hired Panzner to do work in "their buildings" and questions whether Panzner is acting responsibly "in your building." The handbill falls short of the clarity of the others, in which the Union identified Panzner as doing work in Long Island, and not at The Solaire. However, it is unclear whether tenants, many of whom are likely to have received or been offered multiple copies of the other handbills as well, would necessarily be misled by this handbill into believing that the Union's dispute was at The Solaire. The Union does not mention The Solaire on this handbill; rather, it names only the parent company, the Albanese Organization, which may not be identified by the general public as the co-op's owner. In addition, by November 2004 the Union apparently stopped distributing this handbill either in whole or in part.

<sup>9</sup> In addition, the Union clearly did not routinely engage in the kind of confrontational conduct that transformed the use of an inflatable rat in other cases into conduct tantamount to picketing. The agents did not aggressively solicit the public; interfere with suppliers, customers or employees; block building entrances or exits; mass Union agents at the building; use disruptive equipment (such as bullhorns or noisemakers); walk as if to patrol the sidewalk; or otherwise create a gauntlet through which the public must pass. Rather, on most days the Union stationed only two handbillers at The Solaire, neither of whom wore identifiable Union clothing. Compare Laborers Local 79 (C&D Restoration), Case 2-CP-1036, Advice Memorandum dated August

A Section 8(b)(4)(i)(B) violation similarly cannot be made out under these circumstances. It is clear that the Union did not intend to induce employees to withhold services; the Union made no effort to appeal to employees, interfere with deliveries, or induce a cessation of work. In fact, the Union stationed the rat near the building's public entrances, rather than its service entrance. And the handbills, which contained disclaimers, were addressed to the general public, rather than to employees.

Finally, since the Union's campaign did not amount to conduct tantamount to picketing, the Region should dismiss the Section 8(b)(7)(C) charge, absent withdrawal.

B.J.K.